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From: Morris, Brenda
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FYI

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Criminal Charges Said to Be Unlikely in EPA Mine Spill (Daily Environment Report, 12-29-15)



BNA Snapshot

Gold King Mine Spill Liability

Legal Outlook: Environmental attorneys say EPA employees are unlikely to face criminal charges from Gold King Mine blowout, but civil and administrative remedies are possible.

What's Next: The EPA Office of Inspector General is investigating.

By Renee Schoof

Oct. 28 — The Environmental Protection Agency is unlikely to face criminal charges for the reclamation work it led on the Gold King Mine that triggered a blowout and the release of 3 million gallons of mine wastewater that turned a Colorado river orange, environmental attorneys told Bloomberg BNA.

Prosecutors would have to show criminal intent, and they also would have to get past the barrier of sovereign immunity, the principle that the government generally doesn't sue itself, attorneys said.

In addition, the EPA is the agency that normally conducts environmental crime investigations, and some critics in Congress have asked who will hold it accountable for the spill (181 DEN A-4, 9/18/15).

Although criminal charges could be off the table, the EPA could face civil penalties and will be responsible for cleanup, attorneys said.

‘Big Embarrassment.’

Brent Fewell, an environmental and natural resources partner at Troutman Sanders LLP, said the spill was “an incredibly big embarrassment to the agency.”

“There's no question in my mind a company would be facing a criminal investigation and possibly criminal charges at this point,” Fewell, a former principal deputy assistant administrator for the EPA Office of Water, told Bloomberg BNA.

However, in the case of the Gold King Mine spill, the EPA inspector general, an independent entity, will root out what went wrong and what the agency could do differently to prevent it from happening again, he said. An inspector general investigation is under way, and if the office finds evidence of potential criminal conduct, it could make a criminal referral to the Department of Justice.

Under some environmental laws, negligence can result in misdemeanor charges against corporations, Fewell said.

“It certainly should be a lesson learned to the agency in how they handle companies and similar spills,” he said. “One of things I've been increasingly concerned with is the use of criminal negligence to go after corporations. Sometimes it's appropriate, but the government has at times used criminal negligence too loosely and aggressively pursued companies and individuals under a theory of simple negligence.”

Jason Hutt, head of Bracewell & Giuliani's environmental and natural resources practice, told

Bloomberg BNA that not all circuit courts agree, but simple negligence under the Clean Water Act and the Clean Air Act can be sufficient to charge a misdemeanor against a company or an individual. A misdemeanor can trigger penalties as well as significant collateral consequences for those involved, but not jail time, Hutt said.

Fewell said that he doesn't think the EPA employees in this case should face charges.

"It was an honest but costly mistake that can and will be addressed through civil and administrative remedies," he said. "There is no doubt in my mind EPA will do what it needs to do to remediate the problem, working with the states and local communities."

Slideshow: Catching Up on the Gold King Mine Spill

A Bloomberg BNA slideshow that explains the background of the Gold King Mine spill is available [here](#).

Interior Investigates

An investigation by the Department of Interior, released Oct. 22, placed blame on the EPA for the Aug. 5 spill at the mine near Silverton, Colo., but didn't look into downstream impacts as the waste flowed into the Animas and San Juan rivers. The investigation also didn't examine internal communications about who made decisions that led to the accident ([205 DEN A-2, 10/23/15](#)).

David Mears, director of the Vermont Law School's environmental and land use law clinics, told Bloomberg BNA the Interior report confirmed his view "that it is unlikely that any prosecutor would pursue criminal charges against EPA, its employees or contractors or, even if they did, that a court would uphold such charges."

"The report found that mistakes were made, with the primary mistake being that EPA and its consultant did not check the level of water in the tunnel before excavating. While not excusing the mistake, the report's authors also found that this type of mistake is not uncommon in mine remediation. DOI's assessment makes it highly unlikely that a court would find that EPA's actions in this matter rise to the level of a crime," said Mears, a former attorney at the Justice Department's Environment and Natural Resources Division.

EPA's Own Standards

Peter Anderson, leader of the white collar defense and compliance group at Beveridge & Diamond, told Bloomberg BNA there's an argument that the EPA should be held to the same standards it uses in investigations of companies. Those guidelines are in a 1994 [memo](#) by Earl Devaney, who was the director of the EPA Office of Criminal Enforcement. The memo says prosecutors should consider the seriousness of the violation and the culpability of those involved before deciding whether to bring criminal charges.

"The only way to know what charges are appropriate is to know who knew what, and what's the proof of it," said Anderson, a former prosecutor in the Justice Department's environmental

crimes section. "It depends on what the investigation reveals about the nature of the violation and the awareness level."

At the time of the blowout, EPA personnel, state investigators and employees of Environmental Restoration LLC were at the site. The EPA was trying to identify ways to reduce contaminant flows into Cement Creek and downstream waters. Agency investigators were opening a horizontal passage leading into the mine when the blowout occurred (176 DEN B-1, 9/11/15).

Civil Damages Possible

The most likely legal response to the spill will be civil damages against the EPA and its contractor for damages to individual properties and potentially health claims, Mears said.

Civil damage claims would require evidence of wrongful or negligent action, which turns on what was the proper standard of care and whether it was followed, Mears said.

"The central fact as I've understood it is whether they should have known that the wastewater in the mine works was under pressure. They assumed it wasn't under sufficient pressure to cause that kind of release, which turned out of course to be a mistake," he said.

It also remains to be seen whether New Mexico and Colorado—where the rivers flow—will bring enforcement actions. Typically, in situations in which federal agencies are alleged to have violated a federal environmental law, "the states end up being the ones to enforce those requirements," Mears said. These cases generally have been against the Department of Defense and the Department of Energy over such issues as pollution at the Hanford nuclear reservation in Washington state.

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